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Enforcement of Foreign Arbitral Awards in Four Key Latin American Jurisdictions

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Enforcement of Foreign Arbitral Awards in Four Key Latin American Jurisdictions

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Summary

This chapter aims to summarise the arbitration law and practice of certain jurisdictions that have experienced an important development in the past 20 years in their arbitration landscape; they are also countries with significant economic growth. The countries in question are Brazil, Colombia, Mexico and Peru. This chapter focuses on the legislative efforts and the attitude adopted by the courts in these countries in regards to the recognition and enforcements of foreign arbitral awards.

The two international instruments that played a key role in facilitating the conditions for a pro-arbitration forum are the UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law) by suggesting a set of modern provisions that have been nurtured by experiences from all kinds of jurisdictions; and the New York Convention on the Enforcement and Recognition of Foreign Arbitral Awards (the New York Convention), by laying down the principles and positions that states and their courts need to adopt in order to turn arbitration into a feasible and efficient means of dispute resolution.

The above-mentioned countries have invested important efforts in the past few decades in order to become an attractive forum, in order to secure investments and become truly competitive players both regionally and internationally. While certain legal traditions or precedents have provoked minor step backs, the efforts have not ceased, and we are now able to consider them all as convenient forums with a real understanding of the nature of arbitration.

ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN BRAZIL

Arbitration is increasingly being chosen as a dispute resolution method in contracts that need to be enforced in Brazil or that involve Brazilian parties (or both). In a global scenario, however, the main concern for anyone doing business in Brazil is the viability and effectiveness of enforcing an arbitration award issued in a foreign jurisdiction in Brazilian courts.

The Brazilian Arbitration Act, Law No. 9,307/96 (BAA) was enacted in 1996. Although it was initially met with criticism for being considered to be unconstitutional, the Brazilian Supreme Court ultimately held it to be constitutional in 2004. This has significantly encouraged the inclusion of arbitration clauses in contracts involving Brazilian parties.

It is important to remark that the BAA does not provide different treatment for domestic and international arbitration proceedings. However, an award is considered to be a 'foreign' arbitration award whenever it is issued out of the Brazilian territory.

The main consequence of such distinction is that the national arbitral award is considered to be equivalent to a judicial judgment rendered by national courts and the foreign arbitral award - as a foreign judgment - must be recognised by the Brazilian Superior Tribunal of Justice (STJ) prior to its enforcement by a federal court.

Upon deciding if a foreign arbitral award shall be recognised, the STJ will not analyse the merits of the award, but will only examine the formal requirements specified in the Brazilian Code of Civil Procedure (which regulates the recognition of foreign decisions, both arbitral and judicial), the BAA, the New York Convention (ratified in Brazil on 7 June 2002) and the STJ Internal Rules, which provide the domestic rules for the recognition procedure. Should the STJ decide not to recognise an award, such shall not be enforceable in Brazil.

The requirements of the New York Convention and the BAA include the presentation by the requesting party of the duly authenticated original award or a duly certified copy of the same

and the original agreement of the parties to submit the dispute to arbitration (together with a sworn translation of any foreign documents into Portuguese).

The Code of Civil Procedure, the New York Convention and the BAA also set out the basis on which recognition of the award may be refused by the STJ:

- if the agreement containing the arbitration clause is not valid;
- if the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceeding, or was otherwise unable to present his or her case;
- if the award exceeds the limits of the arbitral jurisdiction - ***extra petita*** and ***ultra petita*** awards;
- if the composition of the arbitral authority or the procedure is not in accordance with the agreement of the parties or the law of the country where the arbitration took place;
- if the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country under whose law the award was made;
- • if the subject matter of the dispute is not capable of being solved by arbitration according to the law of Brazil; or
- • if the recognition or enforcement of the award would be contrary to Brazilian sovereignty or public policy.

One important remark concerns the case of arbitral awards that were nullified in the seat of the arbitration. In December 2015, the STJ faced, for the first time, the opportunity to analyse a request for recognition of an arbitral award that was nullified in the respective seat of the arbitration (***EDFI v Endesa/YPF***). In this case, the STJ considered that one of the conditions for the award to be recognised is to be binding in the country under whose law the award was rendered. Therefore, if the award was nullified at the seat of the arbitration, it is no longer binding in such country and may not be recognised in Brazil. As a result, the STJ rejected the request for recognition.

As long as the requirements set forth in the NYC, the BAA and the applicable law are satisfied and the enforcement of the award is not contrary to national sovereignty or public policy, the requesting party in a foreign arbitration can be confident that the award will be recognised in Brazil. The party seeking recognition must only follow the procedural rules set by the Civil Procedure Code and by the STJ in its Internal Rules, which include that the losing party of the arbitration is duly served the recognition procedure, allowing the latter the opportunity to contest the recognition proceedings.

The only arguments for a party to contest a request for recognition of a foreign arbitral award relate to whether the above-mentioned requirements have been met. If the recognition procedure is challenged, the case is sent to the Special Court of the STJ, which will request a legal opinion from the Federal Prosecutor's Office and then decide whether the formalities have been satisfied.

In contested recognition proceedings an adverse costs award is usually made by the court because any challenge to the recognition of the award delays the final conclusion of the case and requires additional work by counsel for the prevailing party. However, since the amounts involved in arbitral awards are generally higher than judicial awards, the STJ has established

such adverse awards with grounds on equity rather than on a percentage of the amount in dispute.

Following recognition of the arbitral award, it is possible for the party to immediately enforce it in Brazil. A recognised award has the status of an enforceable judicial instrument (the same as a domestic court judgment). This makes the process fairly straightforward and assured.

Finally, it is important to emphasise that the STJ adopts a position that is favourable to arbitration and does not reject requests for recognition that satisfy the conditions provided in the above-mentioned rules. Since 2004, when the STJ became the competent court for recognising foreign arbitration awards, it has refused only a very small percentage of contested requests for recognition. Considering only the past five years, the percentage of cases recognised by the STJ is even higher - 19 out of 20 contested requests for recognition were accepted.

It is possible to state that foreign parties can rely on the surety of the STJ for recognising foreign arbitral awards and that such process may be easier and faster than bringing a dispute to domestic courts in Brazil.

ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN COLOMBIA

Even though Colombia ratified the New York Convention more than 25 years ago, in 1990 before the passing of Law No. 1563 of 2012 (Colombian Arbitral Statute), there was always a level of uncertainty when tasked with the undesirable chore of obtaining the recognition and enforcement of a foreign arbitral award by local judicial authorities.

This interpretative quandary and the uncertainty of the Colombian judiciary before the existence of the Colombian Arbitral Statute may be summarised for the purposes of this chapter as follows: the Colombian Supreme Court (judicial authority assigned to rule on the recognition and enforceability of foreign arbitral awards) was juridically ambivalent, sometimes deciding that additional requirements other than those included in article V of the New York Convention were to be applied when evaluating an award's recognition and enforceability, and in other cases, upholding the contrary.

After the passing of the Colombian Arbitral Statute in 2012, the aforementioned predicament ceased to exist, giving way, nonetheless, to new dialectical spheres of debate in terms of the enforceability of foreign arbitral awards, one of which has been particularly controversial and therefore shall be addressed here - the so-called ‘unruly horse'.

The Colombian Arbitral Statute brought an internationally inspired arbitral statute to be applied, debated upon and interpreted by scholars, lawyers and judicial authorities alike.

Said Statute, via articles 111.1 and 112, determines two relevant legal rules regarding enforceability, namely: (i) any and all foreign arbitral awards are to be recognised and enforced prima facie in Colombia; and (ii) the only requirements that a foreign arbitral award must comply with are those contained in article V of the New York Convention. As an additional consideration, it is worth mentioning that article 111.2 of Colombian Arbitral Statute grants full judicial recognition and enforceability per se, to awards assigned by an international arbitral tribunal with a seat in Colombia; though this is only applicable when all of the parties have a domicile in a state other than Colombia, and they have waived their right to the annulment recourse against the arbitral award.

With this in mind, it is possible to examine the content of article V of the New York Convention and, more interestingly, on the way in which Colombian courts have interpreted those normative provisions.

Article V of the New York Convention, applicable in Colombia by way of article 112 of Colombian Arbitral Statute, establishes the following conditions for a foreign arbitral award to be recognised and therefore enforceable:

- Recognition and enforcement of the award may be refused at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought proof that:
    - the parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;
    - the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his or her case;
    - the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award that contains decisions on matters submitted to arbitration may be recognised and enforced;
    - the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
    - the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
- Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
- the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
- the recognition or enforcement of the award would be contrary to the public policy of that country.

Realising, as arbitral experience has dictated, that the most contentious of the mentioned causes by which a foreign arbitral award would not be enforced in Colombia - as presumably also happens elsewhere - is what Burrough, J in ***Richardson v Mellish*** (1824) called a 'very unruly horse' (eg, the interpretation given by Colombian courts of the concept of international public policy), the following paragraphs shall try to paint the clearest possible picture as to the current standing of said concept in Colombian jurisprudence.

What is international public policy as understood by the Colombian Supreme Court? One of the most recent rulings, representative of the current (but ever-changing) mindset of the Supreme Court in this matter, is the recognition request submitted by HTM LLC of an arbitral award by the ICC with a seat in Houston, US, related to a dispute arising from a commercial agency agreement (ruling CSJ SC84453-2016 dated June 24 2016; opinion by Justice Ariel Salazar Ramírez).

This ruling dedicated ample pages to a studious analysis of different optics by which the Supreme Court, as well as other analogous institutions have viewed the concept of international public policy when recognising and enforcing a foreign arbitral award.

In those terms, the Supreme Court initiates its account of the evolution of the unruly horse by citing its ruling dated 5 November 1996 (docket No. 6130) in which the following was considered:

- International public policy is a 'reservations clause', which is thought of as a means to avoid a foreign law, deemed as apt to resolve a specific matter, be applied in Colombia in manifest contradiction with the fundamental principles upon which the country's legal tradition has been instituted.
- The conceptual definition of international public policy is a matter inexorably linked with the notion of justice, not to the mere comparison with local norms. This characterises the unruly horse as a dynamic concept.

The historical tendency to interpret international public policy in Colombia in this way can be attributed to the Supreme Court ruling dated 30 January 2004, which states that:

- In addition to being a reservations clause, related to the concept of justice, hence being dynamic in nature, the interpretation of international public policy must be restrictive, becoming only applicable when a flagrant and overtly notorious contradiction is presented between the way in which the foreign arbitral award was ruled and the most fundamental of Colombian juridical principles.

Furthermore, the Supreme Court recognises the ambiguity of the concept of international public policy derived from the previously summarised judicial opinions, proceeding therefore with the interpretative evolution of the concept by citing its ruling of 27 July 2011 (docket No. 2007-01956-01), adding:

- International public policy as a means to deny recognition and enforceability of a foreign arbitral award is an exception to the general rule (currently article 112 of the Colombian Arbitral Statute) and thus, the Supreme Court reiterates, must be interpreted in a restrictive way.
- The unruly horse must be applied only when the foreign law applied to settle the extraneous dispute is blatantly contrary to Colombian judicial principles, not when it merely differs from them.
- The concept of international public policy shall be integrated - illustratively - by principles associated with law (both public and private), politics, economics, morals and even religion, that are fundamental for the preservation of social order in a specific period in time.
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> International public policy is to be understood as being different from local or internal public order. This implies that, in certain cases, imperative local norms do not necessarily prevail in international matters.

After including the previous citations as precedent considerations, the Supreme Court finally added, in line with a series of guidelines provided by the International Law Association, that there are two types of international public policy that may be breached and cause the denial of recognition and enforceability of a foreign international award:

Substantial international public policy

The Supreme Court lists, in an illustrative fashion, the following principles as part of the substantial unruly horse: the prohibition of abuse of rights, the breach of pacta sunt servanda and the proscription of discrimination and expropriation without compensation.

Procedural International Public Policy

The Supreme Court includes, as examples, the subsequent concepts as part of the procedural unruly horse: the right to receive adequate notification of the arbitral proceeding, a reasonable opportunity to exercise the right of defence, equality between parties and a just process before an impartial judge (ruling CSJ SC84453-2016 dated 24 June 2016).

This has been an effort to convey a profoundly convoluted scenario of judicial interpretation in terms of the Supreme Court's current stance on the application of article 112 of Colombian Arbitral Statute (identical to Article V of the New York Convention). In lieu of the precarious nature of the judicial precedent that has been outlined, the conclusion expressed here must not be taken as absolute truth, but as a reflection of the current mindset of Colombian courts (which is malleable in nature) in keeping with what the unruly horse is meant to represent.

Enforcement Of Foreign Arbitral Awards In Mexico

Ever since the ratification of the New York Convention in 1971, and following the Panama Inter-American Commercial Arbitration Convention in 1978, Mexico has proclaimed itself as an arbitration-friendly jurisdiction, which was confirmed in 1993 when, as part of the obligations it acquired with the signing of NAFTA (article 2022.1), Mexico implemented a modern arbitration statute in its Federal Commerce Code by practically adopting the text of the UNCITRAL Model Law. Such arbitration statute is applicable to both national and international arbitration, when the place of arbitration is in Mexico.

The result of adopting the above-mentioned laws and regulations translates to a restrictive approach with regard to the grounds for setting aside, and recognising and enforcing, arbitral awards; and in the case of the latter, both a national and a foreign award in Mexico shall be subject to the same standard by the Mexican judge who will study the same limited grounds for refusing its recognition or enforcement.

A rather recent reform to the Commerce Code in 2011 helped arbitration practitioners and judges clarifying several procedural aspects concerning the setting aside, recognition and enforcement of arbitral awards.

For instance, a provision declaring that arbitral awards do not need to be homologated to be considered as binding was included, putting a long-debated question to rest and confirming that a foreign arbitral award can obtain recognition more easily than a foreign judgment.

The reform specified the procedure for the different scenarios of court assistance or intervention in the arbitration proceedings as set forth in the law titled, 'special trial for commercial transactions and arbitration'. Such special trial is applicable to requests for both the setting aside and the recognition or enforcement of an award.

Under article 1477 of the Commerce Code, the respondent of a trial, where enforcement or validity of the arbitral award is pursued, is entitled to counterclaim the opposing action before the same judge instead of initiating a separate procedure. By exercising this right, the likelihood of parallel proceedings and contradictory decisions is reduced, as well as the time spent on these proceedings.

In 2014, the Amparo Law was modified. Among its most relevant changes was the fact that article 5 has broadened the concept of 'responsible authority', under which acts can be challenged via an ***amparo*** proceeding. Such broadening raised a question that it was thought had been solved years ago, which is whether an arbitrator and their actions (particularly the issuing of an award) may be subject to such law, thus making it possible for a state court to review the merits of an award in order to determine whether violations to human rights had occurred.

Fortunately, once the cases were filed, Mexican courts adopted criteria confirming the nature of an arbitral award as a private act and not an act of state sovereignty. As for the arbitrators, they confirmed that though they may solve controversies and impose a decision (as ordinary authorities do), such decision is not enforceable per se and requires assistance from state courts; and most importantly, their ability to solve controversies derives not from a law or statute but from the agreement of the parties. Relying on those arguments, the state courts refused to consider arbitrators as authorities (in the sense of article 5) and thus dismissed the claims against the acts of an arbitrator.

However, it should be noted that arbitration is not entirely exempt from the admissibility of ***amparo***. Upon the conclusion of a proceeding seeking or refusing the award's enforcement or recognition, the party for whom the decision is unfavourable may resort to a writ of ***amparo***, if they consider the decision on the enforcement or recognition to contain violations to their procedural rights.

That is, since this request for recognition or enforcement of an award is carried before a judge (who is a state authority), and as the statute indicates that such decision shall not be appealed, the only recourse for the losing party is to challenge it via direct ***amparo*** and only when there has been a violation of procedural rights during this special trial.

Therefore, even when a constitutional review still plays a role in confirming decisions concerning the enforcement of an award, Mexico's attitude towards arbitration remains favourable enough to reduce even this instance of judicial review.

The same can be said about the binding precedents issued by state courts. Just as it occurs in Colombia, public policy is the ground most used by losing parties before Mexican courts. This has forced them to define what should be understood by such term. For instance, the Third Collegiate Tribunal on the First Circuit referred to it as both 'a group of written and unwritten rules, either legal or private, which according to a determined dominant ethic-moral concept, is assumed as the primal and basic condition for social life composed by a diversity of individual interests which do not destroy a situation of harmony and social balance' and a 'group of ethical principles, ideas or social concepts which will shape the legal culture of a country, to be performed by the individuals in accordance to the provisions of the norm, such

as the Constitution or the law, which contain the guarantee of respect of goods or values necessary for the existence of society at a certain historical moment' (revision of Amparo No. 195/2010 dated May 2011).

Mexico's Supreme Court has also described it as an 'elastic and variable' concept, 'which is not just any principle, but the fundamental principle that harmonizes and ranks all legal principles, whether substantial or procedural' (revision of Amparo No. 755/2011 dated 13 June 2012). More recently it has concluded that an award is contrary to public order 'when the issue settled is placed beyond the limits of said order; that is, beyond the legal institutions of the State, principles, rules and institutions that constitute it and which transcends the community by the offensiveness or severity of the mistake made in the decision. An award of that kind would alter the limit set by public order, that is, the mechanism through which the state prevents that certain private acts affect fundamental interests of the society' (revision of Amparo No. 71/2014 dated 18 May 2016).

We can thus observe consistency between these criteria and the Model Law, as well as successful attempts to preserve arbitration as a private dispute resolution mechanism that should be assisted - and not obstructed - by state courts.

ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN PERU

The 2008 Peruvian Law on Arbitration has been described as one of the most modern laws of arbitration in Latin America. The law on arbitration in Peru was based on the UNCITRAL Model Law.

In relation to its basic aspects, it is worth mentioning that the Arbitration Law has adopted principles currently recognised by newer laws, which are more favourable to international arbitration. Some of these principles are:

- the validity and autonomy of the arbitral agreement;
- the respect of the autonomous will of the parties;
- the extent of powers granted to arbitrators;
- the very limited intervention of judges; and
- the final nature of the arbitration award.

It must also be pointed out that the Arbitration Law is one of the few (if not the only) laws that legally establishes an extension of the arbitration agreement to non-signatory parties, which requires a legal mandate in order to be applied, not just by jurisprudence as customary in other countries. As a result, an arbitral tribunal can issue an award to be binding for a non-signatory party of the arbitral agreement and therefore make the award enforceable against such party before the competent courts.

Finally, it is important to note that the Constitutional Court of Peru has stated (judgment in Dossier No. 6167-2005-PHC/TC) that arbitration is recognised as a jurisdictional mechanism (the same as the ruling of a judge), and is also expressly recognised in its Constitution.

On the other hand, Peru is one of the few countries - if not the only country - where the state is legally required to arbitrate its disputes arising from any contract executed with private entities for the procurement of goods, services or works, and in the case of public-private partnership projects. It can be stated with certainty that arbitration cases between the state

and private contractors, suppliers and concession holders comprise the largest number of arbitration cases carried out in Peru.

Enforceability Of Arbitral Awards In Peru

As a general rule, any arbitration award issued by an arbitral tribunal or arbitrator based in Peru is executable and enforceable before Peruvian courts. Unless the parties have agreed otherwise (which would be very unusual), the issued award is final, non-appealable and immediately executable, with the exception of the following: in principle, the judge of the place where the award was issued or where the award should be enforced shall be competent to oversee the enforcement process of the award. Without detriment to the foregoing, the execution judge can order enforcement measures (eg, seizures) anywhere in the Peruvian territory.

Action For Annulment Of The Award

The only possible recourse against an award issued under Peruvian law is the action for annulment. In this regard, the Arbitration Law has provided the grounds for annulment according to the UNCITRAL Model Law. It is necessary to mention that the judiciary considers this a very exceptional remedy, because every year, on average less than 3 per cent of the awards that are challenged this way are annulled. Thus, in practice, the action for annulment has not been an effective way to reject an award or undermine its enforceability. The only way to temporarily suspend the enforceability of an award, during the process of annulment before the judiciary (which normally lasts less than one year), is by submitting a stand by letter of guarantee for the amount of the award, which can be immediately executed by the awardee, if the action for annulment is considered unfounded or inadmissible.

Peru And The New York Convention

Lastly, it is worth mentioning that in 1988, Peru signed the New York Convention. Therefore, arbitral awards issued in Peru can be enforced in territories of other Convention signatory countries, which requires adopting the execution measures accepted in those jurisdictions.

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